

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DRAKE MANOR, INC.,

Petitioner,

- against -

ANGELA DIPILATO,

Respondent.

-----X

NOTICE OF MOTION

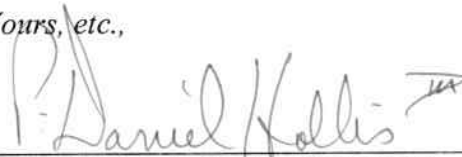
Case No. 07 Civ. 10957(SCR)

PLEASE TAKE NOTICE, that upon the annexed Affidavit of P. Daniel Hollis III, Esq. dated February 8, 2008, and the Exhibits thereto, the accompanying Memorandum of Law in Support of Petitioner's Motion to Remand pursuant to 28 U.S.C. § 1447(c) for Lack of Subject Matter Jurisdiction and upon all of the pleadings and proceedings had herein, the Petitioner, Drake Manor, Inc. will move this Court at the United States Courthouse, 300 Quarropas Street, White Plains, New York 10601, on the 21st day of March, 2008 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order Remanding this action to the City Court of the City of New Rochelle, County of Westchester, State of New York; awarding Petitioner the attorneys' fees and costs attendant to the removal of this action and of this motion to remand and directing Petitioner's counsel to submit an Affidavit of the costs and attorneys' fees incurred; awarding such other and further relief as the Court may deem just and proper.

There has been no prior application for said relief.

Dated: Mt. Kisco, New York
February 8, 2008

Yours, etc.,

A handwritten signature in cursive script, appearing to read "P. Daniel Hollis III", with a small flourish at the end.

P. Daniel Hollis III, Esq. (PH1223)
SHAMBERG MARWELL DAVIS & HOLLIS, P.C.
Attorneys for Petitioner
55 Smith Avenue
Mount Kisco, New York 10549
(914) 666-5600

TO: Ralph J. Elefante, Esq.
ELEFANTE & PERSANIS, LLP
Attorneys for Respondent
670 White Plains Road, Suite 321
Scarsdale, NY 10583
(914) 725-4000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DRAKE MANOR, INC.,

Petitioner,

CIVIL ACTION
Case No.: 07 CIV. 10957 (SCR)

- against -

ANGELA DIPILATO,

Respondent.

**AFFIDAVIT OF
COUNSEL IN
SUPPORT OF
PETITIONER'S
MOTION TO REMAND
FOR LACK OF SUBJECT
MATTER
JURISDICTION**

-----X
STATE OF NEW YORK)
) *s.s.:*
COUNTY OF WESTCHESTER)

P. DANIEL HOLLIS III, being duly sworn deposes and says:

1. I am an attorney at law duly admitted to practice before the courts in the State of New York and before the United States District Court for the Southern District of New York.

2. I am a senior member of the law firm of Shamberg Marwell Davis & Hollis, P.C., attorneys for the Petitioner Drake Manor, Inc. herein and, as such, I am familiar with the facts stated herein.

3. I submit this Affidavit in support of the instant motion by Petitioner Drake Manor pursuant to 28 U.S.C. § 1447(c) requesting this Court remand this action to the state court where it belongs, the City Court of the City of New Rochelle, New York for lack of subject matter jurisdiction.

4. Petitioner Drake Manor is the owner of certain property located at 541 Pelham Road, New Rochelle, New York (the "Property"). On or about July 23, 2001 Petitioner entered into a written lease-hold agreement with the Respondent, Angela DiPilato, for a lease for a portion of the Property with a term of two years beginning on August 1, 2001. Said lease-hold agreement was subsequently renewed for additional two year terms.

5. A state court summary proceeding with the caption *Drake Manor, Inc. v. Angela DiPilato* was commenced in the City Court of New Rochelle by service upon Respondent of a Notice of Petition and Holdover Petition on or about August 1, 2007 (the "Action"). A copy of the Notice of Petition and Holdover Petition are attached hereto as **Exhibit 1**. Prior to the commencement of the Action, Respondent had been previously put on notice as to the basis of what was to become the Action by means of the Notice of Cancellation of Lease and Notice to Vacate dated July 9, 2007. A copy of the Notice of Cancellation and Notice to Vacate setting forth the basis of Respondent's violation of her lease is attached hereto as **Exhibit 2**.

6. The Action was and is based solely upon state law, specifically the New York Real Property Actions and Proceedings Law and the New York Emergency Tenant Protection Act.

7. On August 16, 2007 Respondent filed a Verified Answer and Affirmative Defenses and Counterclaims, a copy of which is attached hereto as **Exhibit 3**. Of the fifty-five (55) counterclaims and affirmative defenses alleged in Respondent's Answer and Affirmative Defenses and Counterclaims (hereinafter "Verified Answer"), only one of the fifty-five (55)

enumerated claims, the fifty-fourth, attempted to allege a federal claim in an obtuse reference to a federal claim couched in that particular claim in conclusory form.

8. On or about September 13, 2007 Respondent filed with the State of New York Office of Housing and Community Renewal a Tenant's Complaint of Rent and/or Other Specific Overcharges in Rent Stabilized Apartments, a copy of which is attached hereto as **Exhibit 4**. On or about October 17, 2007 the Petitioner filed an Answer to Notice And/Or Application, a copy of which is attached hereto as **Exhibit 5**, which Answer set forth, and supported in detail, the fact that Petitioner was not overcharging Respondent for rent or any other costs.

9. Ten days before the scheduled trial of the Action, a Notice of Filing for Removal and Petition for Removal to this Court were filed by Respondent on December 3, 2007, for the removal of *Drake Manor, Inc. v. Angela DiPilato* from the City Court of the City of New Rochelle, New York, Westchester County. A copy of the Notice of Filing for Removal and Petition for Removal are attached hereto as **Exhibit 6**.

10. Respondent erroneously premised such removal upon 28 U.S.C. §§ 1343, 1441, 1443, 1446 and 42 U.S.C. § 1983.

11. Petitioner submits that this motion for remand is proper pursuant to 28 U.S.C. § 1447(c) since there is no federal subject matter jurisdiction over the state court holdover summary proceeding.

12. Respondent's removal of the Action pursuant to 28 U.S.C. § 1441 is not proper since there is no original federal subject matter jurisdiction over the state court action as there

exists neither diversity of parties nor a claim arising under the Constitution, treatise or laws of the United States.

13. Respondent's inclusion of conclusory and unfounded statements in her Verified Answer that federal questions exist does not form a proper basis for removal, as the law is well-settled that an action may not be removed on the basis of a federal defense, a counterclaim, or a counterclaim which appears as part of a defendant's/respondent's answer and which are not part of a plaintiff's/petitioner's complaint.

14. Removal pursuant to 28 U.S.C § 1443 is not proper since Respondent does not have a basis for such removal in a specific law providing for equal rights within the meaning of § 1443, and there is no claim of racial discrimination in any of Respondent's pleadings in the Action.

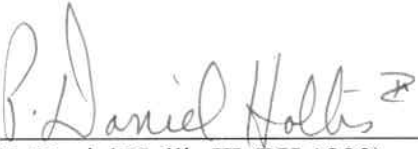
15. Respondent alleges in the Notice of Removal that one basis for Petitioner commencing the underlying holdover summary proceeding in the City Court was Respondent's filing of a complaint of rental overcharges, which Respondent alleges resulted in a retaliatory eviction in the state court summary proceeding, however Respondent's complaint of rental overcharges was not filed until one and one-half months **after** Petitioner commenced the holdover summary proceeding in state court.

16. Even if Respondent had a proper basis within the meaning of 28 U.S.C. § 1443, Respondent would have an adequate State remedy to protect her federal rights, making removal to this Court improper.

17. Respondent's removal was conceived in bad faith, filed at the 11th hour only 10 days before the state court holdover summary proceeding was scheduled for trial, and is contrary to Respondent's allegation that the state court holdover summary proceeding had been withdrawn. A copy of a letter from Morton Kaner, Petitioner's attorney in the Action to the City Court, is attached as **Exhibit 7** advising the City Court that the trial could not be held because of the Respondent's removal. Obviously, and most certainly, it is clear that the Action was on the City Court's calendar at the time of Respondent's removal of the Action.

18. The award of fees and costs along with the granting of the instant motion is proper since no reasonable basis for removal exists, as the underlying action involves only state law claims and Respondent was merely attempting to avoid trial of the holdover summary proceeding that was looming on the procedural horizon.

19. Your deponent respectfully submits that for the reasons set forth in this Affidavit, the Memorandum of Law and all prior proceedings, the Court should grant the instant motion to remand the Action to the proper state court, to wit, the City Court of the City of New Rochelle, New York.


P. Daniel Hollis III (PH 1223)

Sworn to before me this
8th of February, 2008


Notary Public

CARRIE E. HILPERT
Notary Public, State of New York
No. 02HI6170751
Qualified in Westchester County
Commission Expires July 23, 2011

Y:\WPDOCS\07514\001\Documents\Affidavit of PDH.wpd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DRAKE MANOR, INC.,

07 Civ. 10957 (SCR)

Petitioner,

**AFFIDAVIT OF
SERVICE**

- against -

ANGELA DIPILATO,

Respondent.
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STATE OF NEW YORK }
 } s.s.:
COUNTY OF WESTCHESTER }

Diana DiNardo, being duly sworn, says:

I am not a party to the action, am over 18 years of age and reside at: Poughkeepsie, New York.

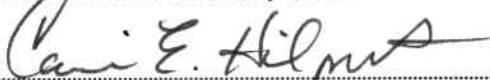
On February 8, 2008, I served a true copy of a **Notice of Motion and Affidavit of Counsel in Support of Petitioner's Motion to Remand for Lack of Subject Matter Jurisdiction** by depositing the same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery to the addressee at the address as indicated below:

Ralph J. Elefante, Esq.
ELEFANTE & PERSANIS, LLP
Attorneys for Respondent
670 White Plains Road, Suite 321
Scarsale, NY 10583
(914) 725-4000



Diana DiNardo

Sworn to before me on February 8, 2008



Notary Public

CARRIE E. HILPERT
Notary Public, State of New York
No. 02HI6170751
Qualified in Westchester County
Commission Expires July 23, 2011